91-1865

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

MARIA WESLEY,

Petitioner

v.

THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW and

BISHOP LEONARD REGIONAL CATHOLIC SCHOOL,

Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1). Does a state impermissibly entangle itself in matters of religion in violation of the First and Fourteenth Amendments to the United States Constitution when it denies unemployment compensation benefits to an employee of a religious entity voluntarily participating in the unemployment compensation system, on the basis of a religious rule, the violation of which would not, as a matter of state law, preclude eligibility for benefits if asserted by a secular employer?

2). Does a state's denial of unemployment compensation benefits to a parochial school teacher for her alleged failure to adhere to a religious tenent of the Catholic Church, impermissibly burden her free exercise rights under the First Amendment to the United States Constitution?

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OFFICIAL AND UNOFFICIAL REPORTS

The Supreme Court of Pennsylvania's denial of the Petition and Cross-Petition for Allowance of Appeal is not reported as of this date. The Opinion of the Commonwealth Court of Pennsylvania is reported at 593 A. 2d 28 (Pa. Commw.)(1991). The opinions of the Unemployment Compensation Referee and the Unemployment Compensation Board of Review are unreported.[1]

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[1]. Party to the proceedings in the Supreme Court of Pennsylvania whose judgment is sought to be reviewed included, in addition to the parties named in the caption in this court, the Mon Valley Unemployed Committee as Amicus Curiae.

JURISDICTIONAL STATEMENT

Petitioner seeks review of a judgment of the Pennsylvania Supreme Court, dated November 12, 1991, which let stand without review the decision of the Commonwealth Court of Pennsylvania entered on June 12, 1991. This court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section I of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Section 402(e) of the Pennsylvania Unemployment Compensation Law provides in pertinent part:

> An employee shall be ineligible for compensation for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.

43 P.S. 802(e)

STATEMENT OF THE CASE

The material facts of this case are undisputed. Bishop Leonard Regional Catholic School ("Bishop Leonard") is a parochial school and voluntary participant in Pennsylvania's unemployment compensation system, as permitted by Pennsylvania law. Christian School Association of Greater Harrisburg v. Pennsylvania Department of Labor and Industry, 55 Pa. Commw. 555, 423 A. 2d 1340 (1980). Petitioner Maria Wesley was

employed by the Catholic Diocese and Bishop Leonard during the 1989-90 school year as a teacher of fifth and sixth grade science and mathematics. Bishop Leonard concedes that Ms. Wesley adequately satisfied the demands of her position.

During the course of Ms. Wesley's employment, Bishop Leonard maintained a policy which stated that:

> The Parish shall retain the prerogative to dismiss a teacher for serious public immorality, public scandal or public rejection of official teachings, doctrine, or laws of the Catholic Church.

On December 13, 1989 Ms. Wesley advised the Bishop Leonard principal that on December 23, 1989 she planned to marry her fiance, a divorced Protestant. Because her fiance had been previously married to a Catholic, and because that marriage had not been annulled,

Ms. Wesley and her fiance were not permitted to be married in the Catholic Church. Rather than forego marriage altogether, they chose to be married in a Protestant ceremony, and were married in the Presbyterian Church on December 23, 1990.

Prior to her discussion with the principal Ms. Wesley spoke with a fellow teacher, a Catholic nun, about her plans and specifically sought guidance as to whether her marriage would jeopardize her employment. She was assured that it would not. The principal, also a Catholic nun, apparently did not know at the time she spoke with Ms. Wesley whether the marriage would result in the Diocese exercising its asserted prerogative to dismiss her, but told Ms. Wesley that she would consult with the Diocesan office for guidance. One hour later Ms. Wesley was advised that her

employment was terminated effective December 22, 1989, the day before her wedding. The purported reason for termination was "public rejection" of Catholic Doctrine.

Ms. Wesley, a practicing Catholic, did not believe that her private marriage in a Protestant Church in any way constituted public repudiation of church teachings. Even if it did, she felt that she had no other choice since absent marriage in a Protestant Church or a non-religious ceremony, she would not be able to be married at all.

Following termination, Ms. Wesley timely filed an application for unemployment compensation benefits which was denied by the local office. She appealed this decision and a hearing was held before an unemployment compensation referee. Bishop Leonard

presented the testimony of Father Lawrence Donardo who testified as an authority on Catholic Church doctrine. Father Donardo conceded that Ms. Wesley's marriage was valid under Pennsylvania law and did not contend that it in any way violated the teachings of the Protestant Church, which sanctioned it. He stated, however, that entering into a marriage not sanctioned by the Catholic church constituted "public rejection of official teaching" as contemplated, though not explicitly stated, by the employer's policy. He testified that even though Ms. Wesley's marriage would not negatively affect her competence as a teacher, it would interfere with the school's primary goal of "transmitting religious beliefs to children". He maintained this opinion even though Bishop Leonard does not require as a condition of employment that a teacher be Catholic, and

despite the fact that Ms. Wesley did not communicate her marriage plans to her students.

By decision dated November 17, 1989 the Referee awarded benefits to Ms. Wesley, finding that Bishop Leonard's policy was unreasonable because it forced Claimant to choose between exercising her right to marry and her employment. Under these circumstances, the referee held, Ms. Wesley had good cause for her actions. [2]

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[2]. Under Pennsylvania law, a violation of an employer policy will not result in a denial of benefits under the willful misconduct section of the law if the rule is unreasonable, or if the employee demonstrates good cause for violating it. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A. 2d 631 (1976).

The employer appealed to the Unemployment Compensation Board of Review which, by decision dated June 8, 1990, affirmed the referee. The Board found that:

> Claimant's actions do not rise to the level of willful misconduct. She did not violate a law of the church prior to the employer's decision to terminate her. She planned to exercise her right to marry and because of these plans, was terminated. Claimant cannot be denied benefits under Section 402(e) of the law.

Bishop Leonard appealed the Board's decision to Commonwealth Court, arguing that by granting benefits to Ms. Wesley the state was essentially imposing a tax upon the Church for exercising its religion. Ms. Wesley argued that the state could not deny benefits to her without excessive entanglement with matters of religion as a matter of state and

federal constitutional law. Moreover, she pointed out that Pennsylvania law creates a special exemption for the Catholic Church excepting it from mandatory participation in the state's unemployment system. Christian School Association of Greater Harrisburg v. Department of Labor and Industry, 55 Pa. Commw. 555, 423 A. 2d 1340 (1980). She further argued that her right to free exercise of her religious choices and her fundamental right to be married would be penalized should the state deny her application for unemployment compensation benefits, and that Bishop Leonard, having opted into the state's unemployment system, should be precluded from asserting willful misconduct on the basis of a religious rule, just as any other employer would be.

The case went before the Pennsylvania Commonwealth Court en banc which, in a 4-3 decision dated June 12, 1991 (Judges Byer, Smith, and Kelly dissenting), reversed the Board and referee, and ordered the Unemployment Compensation Board of Review to deny benefits. The court did not address Ms. Wesley's free exercise claims, but court held that denying benefits to Ms. Wesley was not counter to the Establishment Clause of the First Amendment to the United States Constitution as follows:

> A denial of benefits pursuant to the Act, secular in nature, is not an excessive entanglement of government and religion. The failure to charge the coffers of Bishop Leonard because of Claimant's failure to follow its policy does not advance or promote a particular religion in violation of the Establishment Clause. The Commonwealth accommodates Bishop Leonard by allowing it to advance its religion and as a result to discharge any employee in violation of its policy

> and the teachings of the Catholic Church.

See Commonwealth Court Decision, App. at 22.

Judge Doris Smith strongly dissented and warned that the Court's decision had crossed the constitutional line drawn by the Establishment Clause between accommodation of religious entities and "sponsorship of one thread of religious belief to the disadvantage of another". App. at 36a. She described the problem as follows:

> ...it need be noted that in order to come to the conclusion that Claimant is ineligible for benefits, the majority must arrive at the following conclusions: (a) that Bishop Leonard's rule or policy prohibiting a public rejection of the official teachings, doctrine or laws of the church is reasonable; (b) that Claimant's decision to marry a divorced man violates this church-based rule or policy; (c) that as applied, Bishop Leonard's rule or policy is reasonable: ie. that it is a reasonable rule or policy which prohibits an employee from marrying a divorced person; and

> (d) that Claimant did not have good cause to marry the person of her choice in opposition to Bishop Leonard's rule or policy. One must seriously question how any of these determinations can be made by an arm of the government, whether by this Court or by the Board, without an excessive entanglement in matters of religion. Upon what basis, for example can this Court hold that one church employer's work rule, based upon religious dogma, is reasonable and that another's is unreasonable without violating the Establishment Clause? The result of such decisions will unmistakably have the effect of endorsing one religion's views over that of another, precisely what the Establishment Clause prohibits.

A-35.

Judge Byers, in a separate dissent, echoed these concerns. He stated that since unemployment compensation benefits are paid by the state,

> a religious teaching, standing alone, cannot be the predicate for a determination by the state to deny benefits based upon willful misconduct. To hold otherwise would involve the unemployment compensation authorities and the

> courts in having to make determinations based upon religious principles rather than objective legal principles and would result in treating employees of religious institutions differently from employees of non-religious employers in determining entitlement to unemployment compensation benefits.

App. at 60.

The Unemployment Compensation Board of Review and Maria Wesley both sought review in the Pennsylvania Supreme Court, the state's highest court, challenging the Commonwealth's First Amendment determination. On November 12, 1991 the Supreme Court declined to review the case.

ARGUMENT

This case, apparently one of first impression in this Court, raises the important issue of whether a state, in administering a public benefit program such as an unemployment

compensation system, may deny benefits to an employee of a religious employer which voluntarily opts into the state's unemployment system, on the basis of an alleged violation of a religious rule. The Pennsylvania Supreme Court declined to review the Pennsylvania Commonwealth Court's opinion sanctioning this practice, and as a result immunized religious employers, who voluntarily participate in the state unemployment system, from employee's claims to state benefits by permitting those employers to dictate to the state unemployment system definitions of misconduct which are religiously based and which would not survive challenge if asserted by any other employer. Pennsylvania state unemployment authorities are now in the position of either accepting on face value the religious employer's determination as to whether the employee's conduct constitutes as a matter of state law

willful misconduct, or choosing between conflicting interpretations of church doctrine held by the employer and the claimant, determining the reasonableness of the religious rule in question, and the unreasonableness of the claimant's choice to adhere or not to adhere to a religious tenent-- an inquiry which in this case also involved the reasonableness of the claimant's exercise of her fundamental right to marriage in a Protestant, rather than a Catholic religious ceremony.

The Commonwealth Court's constitutional determination badly misinterprets and misapplies several decisions in which this Court has defined the limits of state power in denying public benefits in the face of free exercise claims. See Frazee v. Illinois Department of Employment Security, 489 U.S.

829, 109 S. Ct. 1514 (1989); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 107 S. Ct. 1046 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 101 S. Ct. 1425 (1981); Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963). Moreover, by holding that an award of benefits to Ms. Wesley would essentially impose a tax on the church for its free exercise of its religious beliefs, the decision conflicts directly with the holding and analysis of this Court's decision in United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051 (1982), in which the Court admonished that "when followers of a particular sect enter into commercial activity as a matter of choice", as the church did here, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory shemes which are

binding upon others in that activity". Id. at 261, 1057.

The principles articulated in Sherbert and its progeny, and in Lee require reversal of the Commonwealth Court decision in this case, which permits the employer to dictate to the state unemployment authorities religiously based definitions of eligibility and to coerce claimant's adherence to these rules as a condition to receiving state created benefits. This Court should use this opportunity to make clear that such schemes for determining eligibility for publicly funded programs violate the First and Fourteenth Amendments.

A. The Commonwealth Court's Decision Crosses the Line Between Accommodation Of The Church's RightTo Free Exercise and Impermissible Entanglement of the State In Matters of Religion

This court has long required that the government adopt a neutral stance in the face of religious differences. Hobbie, supra, 480 U.S. at 145, 107 S. Ct. at 1051; Sherbert, supra, 374 U.S. at 409, 83 S. Ct. at 1797. See also Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947). Accordingly, the government may not compel affirmation of religious belief, punish expression of religious doctrines it believes to be false, impose special disabilities upon the basis of religious views or status, or lend its power to one side over another in controversies over religious authority or dogma. Employment Division of Oregon v. Smith, 494 U.S. 872, 110

S. Ct. 1595 (1991). See also United States v. Lee, supra, (Stevens, concurring), 110 S. Ct. at 1058, n. 2.

The Commonwealth Court decision below runs afoul of these prohibitions in at least two respects. First, the decision requires the state to abdicate its power to the Catholic church to determine whether Ms. Wesley's marriage outside the church constituted as a matter of state law, willful misconduct connected with work. Second, by so doing the court has clearly disadvantaged Ms. Wesley based solely upon her religious choice to follow or not follow church doctrine and to choose a religious marriage in a Protestant church.

The Church argues that because marriage is inherently a public act, any marriage which does not comport with its religious tenets constitutes "public repudiation" as

contemplated by its employment policy. Maria Wesley disagrees that her actions constituted public rejection of church tenets. Despite her decision to be married in a Protestant ceremony, she considers herself a Catholic and did not see her actions as repudiating in any way, publicly or privately, her professed faith.

Intrafaith differences such as these are not uncommon among followers of a particular creed, as this Court has often recognized. See eg., Thomas, 450 U.S. at 715, 101 S. Ct. at 1430. The Court has cautioned that "the judicial process is singularly ill-equipped to resolve such differences". Id. Accord United States v. Lee, supra, 455 U.S. at 257, 102 S. Ct. at 1055 ("courts are not aribiters of scriptural interpretation").

The Commonwealth Court's decision places the state in the middle of this debate

between the Church and one of its followers. There is no way to resolve the dispute as to whether Ms. Wesley through her marriage deliberately "publicly repudiated" the Catholic faith without coming to a decision as to whether her view of public repudiation or the church's is correct.[3] This is exactly the

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[3]. The policy itself did not define any particular act, including marriage outside the church, as a violation of the rule. Even Ms. Wesley's co-workers and superiors, Catholic nuns, were unsure as to whether the rule would be violated by her marriage. Additionally, even if an act did violate the policy, the employment related consequences were unclear. Under the terms of the policy the Church claimed a "prerogative" to dismiss if it concluded that public repudiation had occured. The policy does not state under what, if any, circumstances this prerogative would be exercised. The vagueness of the rule implies that the Church would have to determine on a case by case basis what infractions of Catholic tenents would result in a finding of "public repudiation". Courts cannot be involved in such determinations without wholesale abdication of adjudicative authority, necessarily entangling themselves in religious doctrine, and cannot merely accept the Church's decisions in such matters without lending its force to the Church.

evil which the Establishment Clause is intended to prevent. No matter how a court resolves such a debate, it must favor one religious view over another. And here the Commonwealth Court did just that, ruling that the Church's interpretation was the authoritative one, unmistakably lending the force of the state to the church.

Moreover, even if the court could appropriately accept upon the word of the employer that Ms. Wesley was in violation of the religious rule in question, in order to conclude that the rule violation rose to the level of willful misconduct as a matter of state law, the court had to conclude that Ms. Wesley's choice of a Protestant wedding ceremony under the circumstances was not a reasonable one or that she did not have good

cause for her actions, both necessary predicates for a finding of willful misconduct. MacLean v. Unemployment Compensation Board of Review, 476 Pa. 616, 383 A. 2d 533 (1978). It is virtually impossible to conclude that her actions were not reasonable or that she did not have good cause, as the Commonwealth Court did, without favoring one religious interpretation or choice over another, and impinging significantly upon Ms. Wesley's right of privacy.

Significantly, the Commonwealth Court has acknowledged itself that this analysis under these circumstances entails excessive entanglement with religion. Christian School Association, supra. With reference to this court's decision in National Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S. Ct. 1313 (1979), the court foresaw

exactly the situation which arose in this case, in which an employee of a religious school was dismissed for cause, and the reason given was failure to adhere to religious tenet of the church. As this court recognized in Catholic Bishop, the state function under such circumstances goes beyond mere factfinding:

> The resolution of such charges by the Board (referring to charges of unfair labor practices) in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Catholic Bishops, supra, 440 U.S. at 502, 99 S. Ct. at 1320. Accord Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 107 S. Ct. 2862 (1987)(Brennan, concurring)(searching government inquiry into secular vs. religious

nature of church's activities would entail ongoing government entanglement in church affairs).

It was for this reason that this Court in Catholic Bishop and the Commonwealth Court in The Christian School Association, created an exception for religious organizations such as Bishop Leonard from the otherwise mandatory requirements of the National Labor Relations Act and the Pennsylvania unemployment compensation system, respectively. Bishop Leonard is only involved in Pennsylvania's secular unemployment system because it chose to opt into the program. Having done so, it must stand on the same footing as any other employer and cannot expect special rules to be devised to assist it in sustaining charges of willful misconduct or other grounds for ineligibility. Likewise, it cannot complain if a claim for benefits is granted by the

state authorities over its objection, nor escape the economic burden thereby imposed upon it, like any other similarly situated employer, by claiming that the surcharge is an unconstitutional tax. [4]

The Commonwealth Court's holding to the contrary crossed the line between accommodation of the church and the favoritism towards a religious establishment which the Establishment Clause prohibits. Accommodations are permitted only to lift an identifiable burden upon the exercise of religion. Amos, supra, 483 U.S. at 348, 107 S. Ct. at 2875 (O'Connor, J., concurring).

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[4]. It is quite clear that no other employer could sustain a finding of willful misconduct on the facts presented here. Indeed, there has never been a finding of willful misconduct in Pennsylvania based upon the marriage of a claimant in any employment context outside the Catholic church.

Here, no burden exists. The church is free to hire and fire on religious grounds without fear of consequence, and can avoid unemployment taxes as a result of religiously motivated dismissals by exercising its exemption from the unemployment system.

Moreover, even if despite the church's voluntary waiver of the state's exemption, it could justifiably be concluded that granting benefits to Ms. Wesley infringed upon Bishop Leonard's free exercise rights, it does not necessarily follow that such infringment is unconstitutional or that an accommodation is required. It was exactly this contention which this Court rejected in United States v. Lee. There, an Amish farmer sought an exemption from social security taxes on the ground that both the tax and the benefit it was intended to confer violated his religious

principles. Although the court accepted his argument that his religious exercise was burdened by the tax, this was only the beginning of the analysis. The court recognized that not all burdens on religion are unconstitutional. The government could justify a limitation on religious liberty in this regard with a compelling state interest. The court went on to find that the government did have a compelling interest in mandatory contributions on the part of all employers.[5] Indeed, the court found that religious exemptions to the tax would wreak havoc on the system, and that therefore religious beliefs in conflict with the payment of the tax or its use afforded no basis for resisting it. Every

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[5]. Here, of course, since the state has already accommodated Bishop Leonard, no compelling state interest should be necessary to sustain the incidental impact imposed by the surcharge in this case.

person or entity could not be shielded from all the burdens incident to exercising every aspect of the right to practice their religion. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Id., 455 U.S. at 261, 102 S. Ct. at 1057.

It is exactly the imposition of Catholic Church doctrine upon the state unemployment system which makes the Commonwealth Court's decision in Ms. Wesley's case unconstitutional, and which belies the Church's claim that its free exercise rights were infringed. The Church's right to hire and fire on religious grounds does not thereby

constitutionally require every violation of church doctrine to be defined by the state as willful misconduct. Defining willful misconduct is the function of the state, not the employer, and the state must not be permitted or required to abdicate that function to a religious employer.

B. The Commonwealth Court's Decision Violated Ms. Wesley's Free Exercise Rights

Several fundamental constitutional rights are implicated for Maria Wesley in this case. Her right to marry and to choose to be married religiously in the church of her choice are at the very core of the right to privacy protected by the Fourteenth Amendment from governmental scrutiny. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967). There can be no question that the state's denial of unemployment compensation penalized

her freedom to exercise these rights just as surely as if she had been taxed for her beliefs. As this court has stated on numerous occassions,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nontheless substantial.

Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 107 S. Ct. 1046 (1987). In Sherbert v. Verner, supra, and its progeny, the coercive nature of the choice between adherence to the claimant's religion and forfeiture of unemployment compensation benefits rendered the state's determinations against eligibility for unemployment

compensation constitutionally impermissible. See also Frazee v. Illinois Dep't of Employment Security, supra, Hobbie, supra, Thomas v. Review Board of Indiana Employment Security, supra. Ms. Wesley's constitutional right to depart from the teachings of the Catholic church with respect to marriage stand on just as fundamental a footing as the right to adhere to religious principles did in Sherbert, Thomas, Hobbie, and Frazee. The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Thomas, 450 U.S. at 716, 101 S. Ct. at 1431. State sponsored or condoned coercion to adhere to a religious teaching is just as prohibited by the First Amendment as coercion to abandon one.

Similarly, the the use of state instrumentalities to impinge upon fundamental

privacy rights such as marriage, which are at the core of the Fourteenth Amendment, must be found to be as constitutionally repugnant as penalties on the exercise or non-exercise of religious tenets at issue in Sherbert and its progeny. As this Court has recognized, a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available government program. Thomas, 450 U.S. at 716, 101 S. Ct. at 1431.

When First Amendment freedoms are burdened in such a fashion, this Court has required that the state's interest in the abridgement must be supported by a compelling state interest. Hobbie, 480 U.S. at 144, 101 S. Ct. at 1050; Thomas, 450 U.S. at 718, 107 S. Ct. at 1432. The Commonwealth Court below did not even attempt to support its analysis

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with such an interest. Indeed, it would have been difficult or impossible to do so since the state itself articulated none during the course of the proceedings, arguing instead that Ms. Wesley's claim for benefits should be granted.

In Sherbert, Thomas, Hobbie, and Frazee this Court found that where no compelling state interest supported the abridgement of constitutional rights inherent in the denial of benefits for religiously motivated activity, that payments must be made to the claimant unless the Establishment Clause would thereby be violated. This accommodation was required in order to enforce the state's constitutionally mandated neutrality in the face of religious differences.

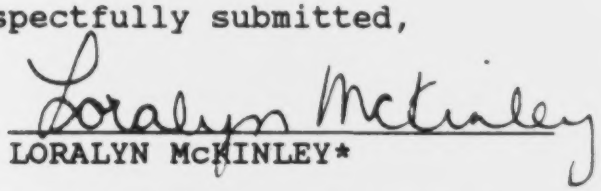
Maria Wesley's situation is quite different, since what she seeks is not an accommodation at all as defined by the controlling precedents, but only what any other claimant for benefits would be legally entitled to under Pennsylvania law if faced with termination on the same basis as she was. She seeks only the opportunity to have her claim adjudicated according to neutral principles of state law, a right which was denied her by the Commonwealth Court's misapplication of the balance carefully constructed by this Court between accommodation of religious entities and unconstitutional favoritism. This case begs for review to re-establish the separation between the state unemployment authorities in Pennsylvania and religious employers which the Constitution mandates, and which the Commonwealth Court impermissibly entangled.

This Court should grant the Writ of Certiorari in order to correct the Pennsylvania Courts' serious misinterpretation of federal constitutional law, and to further elucidate the appropriate separation between church and state in the administration of public benefit programs.

CONCLUSION

For all the reasons stated herein, petitioner Maria Wesley respectfully prays that certiorari be granted.

Respectfully submitted,



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APPENDIX

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

November 14, 1991

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In Re: Bishop Leonard Regional Catholic School v. Unemployment Compensation Board of Review, Cross-Petitioner
Petition of: Maria Wesley, Claimant
No. 355 W. D. Allocatur Docket 1991

Gentlemen:

The Court has entered the following Orders on your Petition for Allowance of Appeal and Cross-Petition for Allowance of Appeal in the above-captioned matter:

(Petition) "Petition Denied Per Curiam" 11/12/91

****

(Cross-Petition) "Cross-Petition Denied Per Curiam 11/12/91

Very truly yours,

Irma T. Gardner
Deputy Prothonotary

cc: Phillip J. Murren,Esq. Maura K. Quinlin,
Linda S. Orago, Esq. Hon. Bernard L.
McGinley

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BISHOP LEONARD REGIONAL :
CATHOLIC SCHOOL, :
Petitioner :
:
v. :
:
UNEMPLOYMENT COMPENSATION:
BOARD OF REVIEW, :
:
Respondent : No. 1282 C.D.
: 1990

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE ROBERT L. BYER, Judge

ARGUED: FEBRUARY 13, 1991

OPINION BY JUDGE McGINLEY FILED: June 12, 1991.

Bishop Leonard Regional Catholic School (Bishop Leonard) appeals from an order of the Unemployment Compensation Board of Review (Board) granting unemployment compensation benefits to Maria Wesley (claimant).[1]

Claimant was last employed by Bishop Leonard as a fifth and sixth grade math and science teacher at a final rate of $11,000 per year. Her last day of work was December 22, 1989. The relevant facts, as found by the Board, are as follows:

> 3. The school has a policy providing as follows:
>
> > 1.2 The Parish shall retain the prerogative to dismiss a teacher for serious public immorality, public scandal or public rejection of official teachings, doctrine, or laws of the Catholic Church. In the event that the

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1 Claimant has intervened in the present controversy pursuant to Pa. R.A.P. 1531(a).

Parish exercises such prerogative, the grievance procedure in this Handbook shall not be applicable. Such a termination would, however, be subject to review under the Code for the Assurance of Due Process of the Diocess of Pittsburgh.

4. Claimant did not sign a contract of employment in which she recognized the employer's right to dismiss a teacher who violated a law of the church.

5. Claimant, who is Catholic, Entered into a relationship with a non-Catholic and they planned to be married on December 23, 1989.

6. Claimant did not cohabit with her fiance.

7. Claimant's fiance was divorced from a catholic woman who subsequently initiated annulment proceedings. The marriage has not been annulled by the Catholic Church.

8. Because claimant's fiance's first marriage was to a Catholic and has not been annulled, he and claimant were unable to be married in the Catholic Church, so they decided to be married in a Presbyterian Church.

9. On or about December 13, 1989, claimant also told the principal, a Catholic nun, of her intentions to be married to a divorced man in the Presbyterian Church.

10. The principal told claimant she was unsure of what to do and that she needed to get in touch with the Diocesan Office.

11. About an hour later, the principal informed claimant she was terminated for violating a law of the Church.

12. The principal asked claimant to stay on until December 22, 1989, claimant's last day of work.

13. Claimant subsequently married her fiance on December 23, 1989.

Board's Decision, May 23, 1990, at 1-2. The Board affirmed the referee's granting of benefits[2] and concluded that "Claimant's actions do not rise to the level of willful misconduct...[s]he did not violate a law of the church prior to the employer's decision to terminate her." Board's decision at 2-3.

On appeal Bishop Leonard argues:

1) that the Board erred in concluding Claimant's conduct did not constitute willful

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2 The referee determined that Bishop Leonard's policy was unreasonable because it forced Claimant to choose between marriage and her job and as a result Claimant had good cause for violating the policy.

misconduct; 2) that the Board's determination was not supported by substantial evidence; and 3) that the Board's decision violates Bishop Leonard's first and fourteenth amendment rights by imposing a burdensome tax on religion. It is Claimant's position that Bishop Leonard's policy is ambiguous and that the denial of benefits on the basis of religious preference furthers the establishment of a particular religion.[3] Additionally, the Board and Claimant contend that Claimant was discharged before the alleged willful misconduct occurred.

Our scope of review is limited to determining whether there has been a

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3 The Board and Claimant assert that this Court is able to render a decision as to the unemployment compensation issues and need not address the constitutional issues. Brief of the Board at 5 and Brief of Claimant at 7.

constitutional violation or an error of law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704: Kirkwood v. Unemployment Compensation Board of Review, 106 Pa. Commonwealth Ct. 92, 525 A.2d 841 (1987).

Initially, Bishop Leonard argues that Claimant's actions constitute willful misconduct because she was informed that marriage to her fiance, prior to an annulment, would be a public rejection of the laws of the Church, thereby subjecting her to termination according to its policy. Bishop Leonard further argues that Claimant did not have good cause for her conduct. Claimant argues that Bishop Leonard's policy is ambiguous and asserts that the term "public rejection" as it appears in the policy is subject to different interpretations.

Claimant maintains that she did not know that her marriage would constitute a "public rejection"1 of the laws of the Catholic Church subjecting her to dismissal.

The question of whether conduct rises to the level of willful misconduct is a question of law to be determined by this Court. Fritz v. Unemployment Compensation Board of Review, 66 Pa. Commonwealth Ct. 492, 446 A.2d 330 (1982). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. Frick v. Unemployment

Compensation Board of Review, 31 Pa. Commonwealth Ct. 198, 375 A.2d 879 (1977). "Where the willful misconduct is based upon a violation of an employer rule or policy, the employer must establish the existence of the rule or policy and that the employee was aware of it." Sewer v. Unemployment Compensation Board of Review, 110 Pa. Commonwealth Ct. 103, 108, 531 A.2d 1174, 1176 (1987). A violation of a known and reasonable rule establishes willful misconduct. Williams v. Unemployment Compensation Board of Review, 109 Pa. Commonwealth Ct. 329, 531 A.2d 88 (1987).

In the present controversy, Bishop Leonard instituted a policy prohibiting its teachers from publicly rejecting "the official teachings, doctrine, or laws of the Catholic Church."

Teacher Handbook, Chapter I, Teacher Requirements Certified Record (C.R.), Item No. 3. Father Lawrence Donardo (Fr. Donardo), Chancellor for the Diocese Of Pittsburgh, testified that "[m]arriage as a sacrament...is a public action" and that "when people enter marriage, whether they enter marriage within the realm of the church by its rule or enter marriage somewhere else, they are making a public proclamation that they are accepting to be married to another person." Notes of Testimony, February 21, 1990 (N.T.), at 7. Fr. Donardo stated Claimant's marriage was invalid because it was a public rejection of the Church's law which holds that marriage is indissoluble. Fr. Donardo stated that "a person who violates the church's law, proclaims that they, in fact, violated the church's law" and that "because it's in the public forum,

automatically is a public repudiation of that particular law." N.T. at 7. This policy applied to Catholics and non-Catholics.[4]

A review of the record reveals Claimant taught in the Catholic school system beginning in August of 1987. Although Claimant did not sign a contract of employment with Bishop Leonard[5], Claimant was

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4 Fr. Donardo testified that "a non-catholic teacher who marries a catholic person and this marriage is not in conformity with the rules of the church...that person would be subject to...discharge." N.T. at 9.

agraph four of the standard contract for full time lay chers states:

> Teacher recognizes the religious nature of the Catholic school and agrees that Employer has the right to dismisS a teacher for. public rejection of the official teachings, doctrine or laws of the Roman Catholic Church, thereby terminating any and all rights that the Teacher may have hereunder....

tract For Elementary School Full Time Lay Teachers, Item 3.

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informed by Bishop Leonard that her marria was a violation of its policy and would result in her termination. Claimant testified that she notified Sister Dorothy December 13, 1989, of her intention to mar Sister Dorothy, after contacting the dioce office, informed Claimant that her marriag would result in her termination. N.T. at 1 Claimant acknowledged that she was informe "exactly what rule [she] was breaking...in the handbook." N.T. at 14. Claimant maintains that because she did not communicate her marriage plans to her students that her marriage did not reflect her ability to teach math and science. We disagree.

Fr. Donardo testified that Catholic teachers are expected to be role models fo their students in and out of the classroom and that their failure to follow the Catho

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teachings compromises their effectiveness in the classroom.[6] "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." Lemon v. Kurtzman, 403 U.S. 602, 618 (1971). We agree that Claimant's conduct directly reflected on her ability to perform her

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6 Fr. Donardo stated:

> Very briefly...the primary purpose is to teach... young people, about the catholic faith. And therefore, the people who happen to teach there, happen to be responsible for the school. The primary interest is that they not only be skilled teachers, but that they also have within their own minds the philosophy of catholic education and their own actions as.. as obviously that they live out the faith both the Christian gospel and obviously the catholic faith...

N.T. at 10.

assigned duties and adversely affected the interest of Bishop Leonard.

Bishop Leonard next argues that there is substantial evidence to support a finding that Claimant violated its policy. Specifically, Bishop Leonard argues that Claimant remained employed during the time that she was in compliance with the policy and that she was discharged after it became apparent that the marriage would take place on December 23, 1989. The Board and Claimant maintain that Claimant did not violate Bishop Leonard's policy because Claimant was terminated as a result of her intention to marry and not because of her marriage.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Pine Haven Residential Care Home v. Department of Public Welfare, 99 Pa. Commonwealth Ct. 1, 512 A.2d

59 (1986). In determining whether there is substantial evidence to support the Board's findings, we must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inference which can be drawn logically and reasonably from the evidence. Johnson v. Unemployment Compensation Board of Review, 94 Pa. Commonwealth Ct. 24, 502 A.2d 738 (1986).

The Board found that, on December 13, 1989, the principal of Bishop Leonard "informed Claimant she was terminated for violating a law of the church." Board's Findings of Fact Nos. 9 and 11 at 2. A review of the record fails to support the Board's findings. In fact, Bishop Leonard and Claimant agree that Claimant was terminated because of her marriage. At the hearing before the referee, counsel for Bishop Leonard stated that "[i]n this case

claimant, after discussing the fact that her planned marriage would be in violation of the rules of the school, went forward with her marriage and subsequently, her employment terminated on this basis." N.T. at 3. Counsel for Claimant stated "she [Claimant] was forced to marry outside of the catholic church and a result of that situation, the school terminated her employment."[7] N.T. at 4. Further, Claimant's own testimony corroborates that she was terminated because

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7 The referee confirmed that there was no factual dispute between the parties. The referee stated:

> So, where...does that leave us?...To proceed, claimant went ahead with the marriage... and then was terminated by the employer under the policy you have been discussing. Okay, well why don't you call a witness, then, for the purposes that we just outlined.

N.T. at 6.

of her marriage. Claimant testified that "it was just a matter of an hour she [principal] came back and said, you know, you have to be terminated." N.T. at 14 (emphasis added). Claimant remained employed as long as she was in compliance with Bishop Leonard's policy or until December 22, 1989.

Lastly, Claimant argues that her marriage was in compliance with the laws of Pennsylvania and that a denial of benefits based on religious dogma constitutes an unconstitutional establishment of religion.

The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion...." U.S. Constitution, Amendment I. Article I, Section 3 of the Pennsylvania Constitution relevantly provides that "no preference shall ever be given by law to any religious

establishments or modes of worship." The primary purpose of the Establishment Clause is to prevent "the sponsorship, financial support and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

Section 402(e) of the Unemployment Compensation Law (Law), 43 P.S. 802(e)[8] provides in pertinent part that "[a]n employee shall be ineligible for compensation for any week... (e)[i]n which unemployment is due to [her] discharge...from work for willful misconduct connected with [her] work." As stated earlier, Bishop Leonard established the existence of a reasonable policy, that Claimant was aware of the policy and that her violation of policy constituted

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8 Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. §§751-914.

willful misconduct. Claimant argues that denying her benefits because her marriage is a violation of Bishop Leonard's policy serves to advance the Catholic religion.

In Lemon the United States Supreme Court set out a three-pronged test[9] to determine whether "the Government itself has advanced religion through its own activities and influences." Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 328 (1987) (emphasis in original).

In Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987), Paula Hobbie was employed by Lawton and Company (Employer), a jeweler, for two and

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9 The Lemon test requires that the law serve "a secular legislative purpose"; that the law have "a principal or primary effect...that neither advances or inhibits religion"; and that the law does not promote an excessive entanglement of government and religion. Id. at 612.

one-half years. IN April of 1984, Paula Hobbie informed her Employer that she was to become a practicing Seventh-Day Adventist and that she would no longer be able to work from sundown on Friday to sundown Saturday. Paula Hobbie was terminated and her claim for unemployment compensation benefits was denied because of "misconduct connected with...work." Fla. Stat. §443.101(1)(a)(1985). The Unemployment Appeals commission (APpeals Commission_ affirmed the denial of benefits. "Hobbie challenged the Appeals Commissions' order in the Florida Fifth District Court of Ap[peals" and "that court summarily firmed the Appeals Commission." Hobbie, 480 U.S. at 139. The United States Supreme Court reversed determining that "[u]nder our precedent, the Appeals Commission's disqualification of...[Paula Hobbie] from

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receipt of benefits violates the Free Exercise Clause of the First Amendment, applicable to the States tnrough the Fourteenth Amendment. Hobbie, 480 U.S. at 139, 140 (footnote omitted). The United States Supreme Court also rejected the Appeals Commission 's argument that the award of benefits would violate the Establishment Clause. In Hobbie the United States Supreme Court determined that "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may so without violating the Establishment Clause." id. at 144-145 (footnote omitted).

In Corporation of Presiding Bishop, the United States Supreme Court also recognized that the accommodation of the religious beliefs of the employer does not violate the

Establishment clause. The United States Supreme Court stated:

> [R]eligious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in Walz v. Tax Comm'n supra, or the loans of school books to school children, including parochial school students, upheld in Board of Education v. Allen, 892 U.S. 286, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.

Corporation of President Bishop, 483 U.S. at 336-337 (emphasis in original).

A denial of benefits pursuant to the Act, secular in nature, is not an excessive entanglement of government and religion. The failure to charge the coffers of Bishop Leonard because of Claimant's failure to follow its policy does not advance or promote a particular religion in violation of the

Establishment Clause. The Commonwealth accommodates Bishop Leonard by allowing it to advance its religion and as a result to discharge any employee in violation of its policy and the teachings and laws of the Church.

Accordingly, we reverse the decision of the Board.

BERNARD L. MCGINLEY, Judge

Judge Kelley dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BISHOP LEONARD REGIONAL CATHOLIC SCHOOL,	:	
Petitioner	:	
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,	:	
Respondent	:	No. 1282 C.D. 1990

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE ROBERT L. BYER, Judge

ARGUED: FEBRUARY 13, 1991

DISSENTING OPINION
BY JUDGE SMITH
FILED: June 12, 1991

I strongly dissent. Every facet of the majority Court's opinion -- its analysis, conclusions, assumptions, and holding -- serves to apply section 402(e) of the Law to the facts of this case in a manner that violates the Establishment Clause of the First and Fourteenth Amendments of the United States Constitution as well as Article I, section 3 of the Pennsylvania constitution. Because the majority's analysis ignores the fundamental prohibition of the Establishment Clause and Article I, Section 3 against excessive entanglement by the government in religious affairs and ultimately sponsors one thread of religious belief to the disadvantage of another, in addition to the disadvantage of other fundamental rights, I am compelled to voice my dissent.

I

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I. The U.S. Supreme court has unwaveringly determined that the foremost evils against which the clause was intended to protect are the "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission of City of New York, 397 U.S. 664, 668 (1970). See also Lemon v. Kurtzman, 43 U.S. 602 (1971). Writing separately in Lemon, Justice Brennan stated that:

> [w]hat the Framers meant to foreclose, and what our decisionS under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use

> essentially religious means to serve governmental ends, where secular means would suffice. where the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers -- as much to the church as to the state -- which the Framers feared would subvert religious liberty and the strength of a system of secular government.

Id. at 643 (quoting School District of Abington Township v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring)). Moreover, the Establishment Clause requires that the end result of government action must avoid the excessive entanglement with religion that the clause prohibits, regardless of the motivation. "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the

inquiry...We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion." Walz, 397 U.S. at 674.

Article I, Section 3 of the Pennsylvania Constitution is more direct and self-evident than the Establishment Clause in its prohibitionS and statement of rights:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can in any case whatsoever, control, or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship. (Emphasis added.)

The difficulty of integrating government institutions with matters occurring within or affecting religious or parochial schools is well recognized. "The

substantial religious character of these church-related schools gives rise to the entangling church-state relationships of the kind the Religious Clauses sought to avoid." Lemon, 403 U.S. at 616. For this reason, this Court determined that religious schools were exempt from the mandatory requirements of providing unemployment compensation benefits under the Law in Christian School Ass'n of Greater Harrisburg v. Department of Labor and Industry, 55 Pa. Commonwealth Ct. 555, 423 A.2d 1340 (1980). Notably, this Court in Christian School Ass'n focused upon the constitutional difficulties inherent in situations exactly like the one now before this Court, where the issue of eligibility for benefits hinges upon whether the reason for an employee's discharge, based upon matters of religious dogma, involves the employee's willful misconduct. Quoting Grace

Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP (C.D. Cal., filed Sept. 21, 1979), slip op. at 12, vacated and remanded on other grounds, 457 U.S. 393 (1982), this Court recognized that:

> [D]isputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is failure to adhere to religious tenets of the church.
>
> The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the [U.S. Supreme] Court found to involve dangers of excessive entanglement in [NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)].

55 Pa. Commonwealth at 563-64, 423 A.2d at 1345.

In this case, Bishop Leonard has, for reasons of its own, waived its exemption under the Law and has chosen to provide its employees the benefit of unemployment compensation. This does not mean that

constitutional concerns are placed aside, nor does it mean, as Bishop Leonard appears to argue, that they apply to protect only one party in this proceeding, namely Bishop Leonard. The majority's opinion, however, fails to address the dangers articulated by a long string of Supreme Court decisions regarding the Establishment Clause in cases of this nature, disregards the clear language of the Pennsylvania Constitution, and avoids the concerns expressed earlier by this Court in Christian School Ass'n. Instead, the majority embarks on a traditional willful misconduct analysis as if the Claimant, rather than merely deciding to marry a person whose circumstances are disapproved of by her employer, was caught with her hand in the till or asleep on the job or absent without leave. The Establishment Clause and Article I, Section 3 prohibit this simple approach.

II

The basis for Bishop Leonard's contention that Claimant was discharged for willful misconduct connected with her work is that Claimant violated a rule or policy of the employer, namely, a prohibition against "public rejection of official teachings, doctrine, or laws of the Catholic church." This Court has consistently held that a violation of a known and reasonable rule or policy of an employer may constitute willful misconduct except when the employee has good cause to violate the rule or policy. Spirnak v. Unemployment Compensation Board of Review, 125 Pa. Commonwealth Ct. 354, 557 A.2d 451 (1989). Claimant argues that Bishop Leonard's rule is ambiguous; that she did not know that her actions would constitute a violation of that rule (nor, apparently did her principal, who is a nun); and that in any event she had

good cause to violate the rule, if a violation did in fact occur, since that violation consisted only of entering into an institution (marriage) expressly permitted by the Commonwealth. Moreover, Bishop Leonard's rule or policy forced her between the Scylla and Charybdis of either keeping her job and foregoing marriage to the person of her choice and in the church of her choice, or losing her job and marrying the person of her choice in the church of her choice, which is unacceptable to the Catholic Church.

The majority, however, fails to address any of Claimant's contentions (except Claimant's Establishment Clause argument), and concludes without any analysis or discussion that Bishop Leonard's rule or policy is reasonable and then that the evidence showed that Claimant's intention to marry a divorced man violated that rule or

policy. The majority completely ignores Claimant's argument that if a violation did indeed occur, claimant had a good excuse for carrying through with her actions, thus depriving Claimant of a meaningful review and ignoring an issue that this Court's settled law requires be discussed. Further, the majority found that Claimant's desire to marry a divorced man "directly reflected on her ability to perform her assigned duties and adversely affected the interest of Bishop Leonard" -- something neither the referee nor the Board found as a fact or even discussed; and thus, the majority impermissibly strays into the area of fact finding in order to champion its cause.[1] Slip op. at 8.

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1 Arguably, the majority is also fact finding in accepting Fr. Donaro's testimony that a decision to marry a divorced person publicly rejects the law of the Catholic Church since neither the referee nor the Board actually found as

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Therefore, even under a traditional willful misconduct analysis, the majority's opinion is insupportable.

Turning to the constitutional concerns, it need be noted that in order to come to the conclusion that Claimant is ineligible for benefits on the grounds of willful misconduct, the majority must arrive at the following conclusions: (a) that Bishop Leonard's rule or policy prohibiting a public rejection of the official teachings, doctrine, or laws of the Catholic Church is reasonable; (b) that Claimant's decision to marry a divorced person violates this church-based rule or policy; (c) that as applied, Bishop Leonard's rule or policy is reasonable: i.e., that it is a reasonable

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1(...continued)
a fact that Claimant's actions were a violation of Bishop Leonard's rule or policy.

rule or policy which prohibits an employee from marrying a divorced person; and (d) that Claimant did not have good cause to marry the person of her choice in opposition to Bishop Leonard's rule or policy. One must seriously question how any of these determinations can be made by an arm of the government, whether by this Court or the Board, without an excessive entanglement in matters of religion. Upon what basis, for example, can this Court hold that one church employer's work rule, based upon religious dogma, is reasonable and that another's, also based upon religious dogma, is unreasonable without violating the Establishment clause? The result of such decisions will unmistakably have the effect of endorsing one religion's views over that of another, precisely what the Establishment Clause prohibits. See Walz; Christian School Ass'n.

Indeed, Bishop Leonard argues that a finding that its rule or policy is unreasonable would be a violation of the Establishment Clause and that this Court must find its rule or policy to be reasonable "as a matter of law." petitioner's Brief, p. 19, n. It would be equally violative of the Establishment Clause, however, ifs this Court, as it has done, were to find that a work rule based upon religious dogma is reasonable. As the Supreme Court held in School District of City of Grand Rapids v. Ball, 473 U.S. 373, 389 (1985):

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement ... of religion, a core purpose of the Establishment Clause is violated.

Further, Article I, Section 3 of the Pennsylvania Constitution expressly prohibits the granting of preferences to any religious establishment, and that is exactly what happens when this Court engages in a process that permits it to declare religiously based work rules to be either reasonable or unreasonable.

Perhaps one may argue that the issue of reasonableness can be determined on an "objective" basis as if this Court had before it the work rule, non-religiously based, of a secular employer. In Spirnak, this Court stated that "[i]n determining reasonableness, this court should consider whether application of the rule or policy under the circumstances is fair and just and appropriate to accomplish a legitimate interest of the employer." 125 Pa. Commonwealth Ct. at 357, 557 A.2d at 453.

But these standards make the inquiry only that much more difficult when a religiously-based work rule is present. How can this Court determine whether a rule based on religious dogma is fair, just, or appropriate without again stamping governmental approval on some religious beliefs while disapproving of or disparaging others? The majority determines, however, that it is a fair, just, and appropriate work rule which prohibits teachers from marrying persons whose circumstances are disapproved of by the church employer, and that the teachers are without good cause for violating such a rule.

III

Further, the majority's decision to follow this court's established willful misconduct analysis in this case opens up other First Amendment dilemmas. At the hearing, Bishop Leonard produced an expert in

its church doctrine and laws who testified that Claimant's conduct constituted a public rejection of that church's official doctrine and law. What would have been the result if Claimant had produced her own expert to testify that her actions are not a public rejection of official doctrine and law? The Board would have been placed in the position of deciding matters of religious law or doctrine in order to determine whether a work rule was violated. This is expressly beyond its, and any court or tribunal's, function and competence; and, again, it would be a clear violation of the Establishment Clause for the Board to make such a determination and this Court to uphold it. See United States v. Lee, 455 U.S. 252, 257 (1982) ("courts are not arbiters of scriptural interpretation"); Employment Division, Department of Human Resources of Oregon v.

Smith, 494 U.S. ___, ___ 58 U.S.L.W. 4433, 4437 (1990) ("[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place off a particular belief in a religion or the plausibility of a religious claim"). By its holding, however, and especially in light of Claimant's argument that Bishop Leonard's work rule or policy is ambiguous and that she did not believe she was violating it, is not the majority also straying into this First Amendment prohibition?

Moreover, as the Supreme Court has time and again held, the end result or effect of the government action must also be free of First Amendment violation: See, e.g., Lemon and Walz. What is the end result of the majority's holding? First it must be observed, as Judge Colins persuasively wrote

in dissent in Bishop Carroll High School v. Unemployment Compensation Board of Review, 125 Pa. Commonwealth Ct. 302, 313, 557 A.2d 1141, 1146 (1989), appeal denied, ___ Pa. __, 575 A.2d 569 (1990), a case remarkably similar in its facts to the present case: "By denying unemployment compensation under these circumstances, we are making two religious declarations: (1) we will be allowing a religion to use the [Law] to further its tenets on a de facto basis; and (2) we will be using the [Law] to recognize a hierarchical system of marriage within the Commonwealth." In Bishop Carroll, a teacher was discharged from his position in a catholic school after he notified his principal that he was cohabiting with a divorced woman. The teacher, unlike Claimant in the present case, had signed an employment contract that set forth the policy against

public rejection of the official teachings, doctrine, and laws of the catholic Church. The teacher told the school of his plans to marry his companion civilly and then in the catholic Church after she obtained an annulment, and they subsequently did marry in a ceremony in a different church (as did claimant in this case). Notwithstanding, the school opposed the teacher's eligibility for benefits claiming willful misconduct, and this court upheld that position for essentially the same reasons set forth in the majority's opinion in this case.[2]

Judge Colins is certainly correct that the effect of the holding in Bishop Carroll and the identical holding in this case will serve, not to merely accommodate

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2 Curiously, the majority does not use Bishop Carroll as authority for its holding, though the cases are virtually identical.

religion as the majority contends, but to endorse the tenets of a particular religion and give primacy to one religion's view of marriage over any other view of marriage. This includes the view of the Commonwealth and of any church that does not follow the Catholic Church in its beliefs about divorce, including the Presbyterian Church where Claimant married.[3] Also, there is no

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3 The following exchange between the referee and Bishop Leonard's attorney at the hearing in this case is instructive:

> QR: In what way did claimant act contrary to the laws of the church?
>
> EL: She, being a catholic, entered into a marriage with a divorced catholic [he was actually Protestant] in the Presbyterian Church. This marriage is not valid in the eyes of the Catholic Church. It violated the section of the rule that states that it was a public repudiation and rejection from official church teachings, doctrine, and

(continued...)

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escaping the conclusion that the majority's holding in this case serves to prefer or endorse Bishop Leonard's religious beliefs over that of the Claimant's and serves to prefer or endorse Bishop Leonard's religious beliefs over Claimant's equally fundamental right of privacy. As explained below, the majority's holding sponsors and gives primacy to the official teachings, doctrine, and laws of the Catholic Church through application of the Law and in so doing gives financial support to the Church to the detriment of another who, according to Bishop Leonard,

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3(...continued)

> laws...Father Donardo...could give a further explanation about that.

N.T., p. 4.

happens not to adhere to the official teachings, doctrine, and laws of its church.[4]

IV

In a line of cases, one of which the majority relies upon, the Supreme court has held that an individual who is discharged for cause related to the exercise of his or

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4 Further, this holding absolutely violates Article I, Section 3 of the Pennsylvania constitution which provides in part that "no human authority can, in any case whatsoever, control or interfere with rights of conscience." Claimant, by deciding to marry outside the Catholic Church, has exercised her right of conscience; and the majority penalizes her for doing so by stripping away her right to benefits under the Law. It should go without saying that it makes no difference that one party in this action is a member of an established church and the other, while perhaps considering herself a member of that church, deviates from its teachings if only in one respect. The First Amendment protects not only "established" religions but all forms of faith and belief, including non-belief, and does not allow for the primacy of any. See Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989).

her religious beliefs, or who refuses work for the same reason, may not under the Free Exercise Clause of the First Amendment be deprived of unemployment compensation benefits.[5] See Sherbert v. Verner, 374 U.S. 398 (1963) (Sabbatarian discharged for refusal to work on Saturdays); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981) (Jehovah's Witness forced to leave work when employer transferred him to a division that made armaments); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) (employee discharged for refusal to work on Saturdays after conversion to the Seventh Day Adventist church); Frazee v. Illinois Department of Employment Security, 489 U.S.

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5 The Free Exercise clause of the First Amendment reads: "Congress shall make no law...prohibiting the free exercise [of religion]..." U.S. const. amend. I.

829 (1989) (Christian, not a member of an established religious sect or church, refused to accept a position offered by an employment agency because it required work on Sunday). The posture of these cases is ably articulated in Sherbert:

> For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is invalid even though the burden may be characterized as being only indirect.' Braunfeld v Brown ... (366 US [599] at 607 [(1961)]). Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404 (emphasis added). Similarly, the government imposition of a similar choice upon claimant forced by the majority opinion in this case is the same kind of burden on Claimant's free exercise rights as if a fine were imposed against her for marrying outside the Catholic Church, which is effectively what is happening.

The Court in Thomas further stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious faith, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18. This should be no less true where the state conditions receipt of an important benefit upon conduct prescribed by a religious faith. There seems no question

that using the Law to require employees to adhere to the religious beliefs of their employers upon pain of forfeiting benefits thereunder places a state-sponsored burden on the free exercise of religion in violation of the Free Exercise Clause. Further, the court has held that "[g]overnment may neither compel affirmation of a repugnant belief ... nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities..." Sherbert, 374 U.S. at 402 (citations omitted; emphasis added), or, for that matter, to one's employer. A religious, spiritual view abhorrent to one's employer (in this case, marriage to a divorced person or in a different church) is afforded as great a degree of protection under the First Amendment as the employer's religious or spiritual views; and in accordance with the

Supreme Court's holdings in Sherbert, Thomas, Hobbie, and Frazee, one cannot be stripped of state-created benefits for expressing and acting upon religious or spiritual views different from that of one's employer.

Moreover, one finds a parallel in this case to Lee, where the Supreme Court held that "[g]ranting an exemption from social security taxes to an employer [on religious grounds] operates to impose the employer's religious faith on the employees." 455 U.S. at 261. The exemption of Bishop Leonard from its voluntary participation in the unemployment compensation system under the circumstances of this case has exactly the same effect. Although the majority correctly states that the purpose of religion is to advance its own beliefs, religions cannot do so by employing the organs of the state in a manner which infringes upon the

beliefs of others and sheds the religious employer's financial burden upon employees who disagree in matters of faith.

The state may, however, substantially burden the free exercise of religion if there exists a compelling state interest in the regulation off a subject within the state's constitutional power to regulate. Sherbert. I can discern no compelling state interest which justifies the burden the majority places upon claimant's free exercise of her beliefs. Certainly, the primacy of the official doctrines of the catholic church, as enunciated by Bishop Leonard, over the beliefs of claimant concerning marriage in or outside of that church is not sufficient. On the contrary, it is abhorrent to the First Amendment.[6]

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6 Further, the majority's decision also serves to infringe upon claimant's (continued...)

V

Having established that the majority's opinion is insupportable in its own right and as a matter of constitutional law, the discussion must address the constitutional concerns raised by Bishop

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6(...continued)
constitutional right to privacy. It is well established that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Kramer, 455 U.S. 745, 753 (1982). See also Fabio v. Civil Service Commission of City of Philadelphia, 489 Pa. 309, 414 A.2d 82 (1980) (the constitutional right to privacy protects from governmental interference activities relating to marriage). The majority ignores this fundamental constitutional precept and holds that since an accommodation of religion is sometimes permitted under the First Amendment, this court will use the Law to further the religious beliefs of the Catholic Church at the expense of claimant's beliefs and her constitutional right to make free personal choices concerning marriage and family life or suffer the pain of losing state-created benefits. There is no basis in constitutional law that could support such a result.

Leonard. Bishop Leonard argues that an affirmation of the Board's order would essentially result in a tax levied against it for its free exercise of religion in violation of the First Amendment. There is no question that either result in this case -- the granting or denial of benefits -- involves some entanglement with religion. See Bishop Carroll (Colins, J. dissenting). What must be avoided is an excessive entanglement of the state and religion. Walz. Pursuant to decisions of the U.S. Supreme Court, a grant of benefits to claimant would be unconstitutionally permissible and indeed in accordance with the constitutional scheme. First, Judge Colins' able analysis in Bishop Carroll is noted:

> A state system cannot effectuate religious doctrines. Bishop Carroll of its own volition participated in the unemployment compensation system. It was never required to participate and remains free to

> terminate its participation at any time. Once it chooses to voluntarily assume this relationship, it thereby places itself within the jurisdiction of the [Law] in the same manner as any other employer and religious holdings must give way to secular laws. Bishop Carroll must accept the fact that under the mandate of the First Amendment the state has an obligation to remain as neutral as possible in the face of religious differences. School District of Abinaton v. Schempp, 374 U.S. 203, 215.

125 Pa. Commonwealth Ct. at 312, 557 A.2d at 1146. This analysis is mirrored by the words of the Supreme Court in Lee:

> Congress and the courts have been sensitive to the needs flowing from the free exercise clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. (Emphasis added.)

455 U.S. at 261. The court in Lee rejected an argument by a self-employed Old Order Amish farmer and carpenter that the imposition of social security taxes and requirements violated his First Amendment free exercise rights and those of his employees because members of his religion believe that there is a religiously-based obligation to provide for their fellow members the kind of assistance contemplated by the social security system, and therefore their religion prohibits acceptance of social security benefits and payment of social security taxes.

Therefore, Bishop Leonard, having voluntarily participated in the state-created system of unemployment compensation relief, is prohibited from superimposing its religious beliefs upon the statutory scheme of the Law. although there is no question that Bishop Leonard has the right to

terminate any employee for violating religious tenets of the Catholic Church, or for any other reason absent an agreement to the contrary, it cannot require the Commonwealth's unemployment compensation system to define violations of the Catholic Church's religious tenets as work-related willful misconduct. See Bishop Carroll (Colins, J., dissenting). On the other hand, it is also clear that "no State 'may exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.'" Sherbert, 374 U.S. at 410 (quoting Everson v. Board of Education of Ewing Township, 330 U.S. 1, 16 (1947)) (emphasis in the original). Moreover, an award of benefits to Claimant in this case

would reflect "nothing more than the governmental obligation of neutrality in the face of religious differences, and [would] not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." Id. at 409 (emphasis added).

There being no act committed by Claimant which any employer could complain of absent a religious tenet to the contrary, the order of the Board must be affirmed.

_____

DORIS A. SMITH, Judge

BISHOP LEONARD REGIONAL CATHOLIC SCHOOL, PENNSYLVANIA	:	IN THE COMMONWEALTH COURT OF
Petitioner	:	
v.	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,	:	
Respondent	:	
1282 C.D. 1990	:	No.

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE ROBERT L. BYER, Judge

ARGUED: FEBRUARY 13, 1991

DISSENTING OPINION BY JUDGE BYER
FILED: June 12, 1991

I respectfully dissent and would affirm the decision to grant unemployment compensation benefits. Because unemployment

I believe that a religious teaching, standing alone, cannot be the predicate for a determination by the state to deny benefits based upon willful misconduct. To hold otherwise would involve the unemployment compensation authorities and the courts in having to make determinations based upon religious principles rather than objective legal principles and would result in treating employees of religious institutions differently from employees of non-religious employers in determining entitlement to unemployment compensation benefits.

Furthermore, I find the majority's decision very troubling when I consider how we draw the appropriate lines in cases which might arise in the future. For example, what would be the result if the religious teaching in question were that the employee could not marry a person of a different religion? What

would be the result if the religious teaching were that an employee could not marry a person of a different race? I would like to think we would hold that the state may not deny payment of benefits on the basis of willful misconduct in these hypothetical cases, but on what basis could be distinguish this case?

I think the best way to answer these questions is on an objective basis, treating employees of religious employers and non-religious employers equally for purposes of paying unemployment compensation benefits. I have no doubt that the work rule involved in this case would not be a basis for the state to deny benefits on the basis of willful misconduct if it were imposed by a

non-religious employer. I would hold no differently here.[7]

ROBERT L. BYER, Judge

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7 I do not imply that a religious institution has no right to terminate an employee for violating religious teachings. See Little v Wuerl, 929 F.2d 944 (3d Cir. 1991). That is a far different question from the question in this case, which is whether the state may deny benefits based upon a religious teaching. The same considerations of avoiding excessive entanglement which motivated the Third circuit in Little to hold that Title VII does not apply to this situation should cause us to affirm the award of benefits here.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
LABOR AND INDUSTRY BUILDING
HARRISBURG, PENNSYLVANIA 17121

DECISION AND ORDER

Appeal No.	Decision No.	Order Mailing Date
90-6-A-50	B-28231	May 23, 1991

Concerning the Claim of Employer

Maria Wesley
12 Giant Oak Drive
Baden, PA 15005

Bishop Leonard Regional
Catholic School
434 Ormsby Avenue
Pittsburgh, PA 15210

Date of Application for Benefits:
December 31, 1989

Waiting Week Ending Date:
January 6, 1990

Compensable Week Ending Date(s)

Appeal from Referee's Decision Filed By:

__ Claimant _X_ Employer __ ES

Nature of Referee's Decision: March 1, 1990

The Determination of the Office of Employment Security is reversed and claimant is allowed claim credit for waiting week ending January 6, 1990.

FINDING OF FACT:

1. Claimant was last employed as a math and science teacher by Bishop Leonard Regional Catholic School for approximately four months at a final rate of $11,000 per year and her last day of work was December 22, 1989.

2. Bishop Leonard Regional School is a Catholic school operated by the Diocese of Pittsburgh.

3. The school has a policy providing as follows:

   1.2 The Parish shall retain the prerogative to dismiss a teacher for serious public immorality, public scandal or public rejection of official teachings, doctrine, or laws of the Catholic Church. In the event that the Parish exercises such prerogative, the grievance procedure in this Handbook shall not be applicable. Such a termination would,. however, be subject to review under the Code for the Assurance of Due Process of the Diocese of Pittsburgh.

4. Claimant did not sign a contract of employment in which she recognized the employer's right to dismiss a teacher who violated a law of the church.

5. Claimant, who is Catholic, entered into a relationship with a non-Catholic and they planned to be married on December 23, 1989.

6. Claimant did not cohabit with her fiance.

7. Claimant's fiance was divorced from a Catholic woman who subsequently initiated annulment proceedings. The marriage has not been annulled by the Catholic Church.

8. Because claimant's fiance's first marriage was to a Catholic and has not been annulled, he and claimant were unable to be married in the Catholic Church, so they decided to be married in a Presbyterian Church.

9. On or about December 13, 1989, claimant also told the principal, a Catholic nun, of her intentions to be married to a divorced man in the Presbyterian Church.

10. The Principal told claimant she was unsure of what to do and that she needed to get in touch with the Diocesan Office.

11. About an hour later, the principal informed claimant she was terminated for violating a law of the Church.

12. The principal asked claimant to stay on until December 22, 1989, claimant's last day of work.

13. Claimant subsequently married her fiance on December 23, 1989.

DISCUSSION: Employment Security issued a determination denying benefits to the claimant. The claimant filed an appeal therefrom, and following a hearing at which the claimant and the employer

representatives, both assisted by counsel, appeared and testified, the Referee issued a decision reversing Employment Security's determination. Thereafter, the employer filed a further appeal from he Referee's decision.

Section 402(e) of the Law provides that a claimant shall be ineligible for compensation any week in which her unemployment is due to her discharge or temporary suspension from work for willful misconduct connected with her work. While the term "willful misconduct" is not defined in the Law, the board of Review and the Appellate Courts in numerous decisions have defined willful misconduct as an act of wanton or wilful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of he standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer.

On or about, December 13, 1989, the employer notified claimant of her impending termination and asked claimant to stay on until December 22, 1989. The employer terminated claimant for violating a law of the Church. The law in question forbids a Catholic from marrying a divorced person whose previous marriage has not been annulled by the Church. Claimant at the time of her termination had not married yet, she had only told the principal of her plans to marry.

Claimant's actions do not rise to the level of willful misconduct. She did not violate a

law of the Church prior to the employer's decision to terminate her. Claimant planned to exercise her right to marry and because of these plans, was terminated. Claimant cannot be denied benefits under Section 402(e) of the Law.

CONCLUSIONS OF LAW: The claimant is not ineligible for benefits under the provisions of Section 402(e) of the Pennsylvania Unemployment Compensation Law.

ORDER: The decision of the Referee is affirmed and benefits are granted.

UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

Thomas L. Simon, Chairman

Francis P. Bonner, Member

Dale E. Groman, Member

PENNNSYLVANIA UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

REFEREE'S DECISION

Order Mailing Date	Appeal No.	Appeal Date
March 1, 1990	90-6-A-50	January 31, 1990

Concerning the Claim of Employer

Maria Wesley
12 Giant Oak Drive
Baden, PA 15005

Bishop Leonard Regional
Catholic School
434 Ormsby Avenue
Pittsburgh, PA 15210

_____ Nature of Office of Employment
Hearing Date and Location:
Examination: January 16, 1990
February 21,1990 - Ambridge, PA
Disapproved, Section 402(e)

Date of Application for Benefits:
____ Appearances: December 31, 1989

___ Claimant ___ Employer Waiting Week

Ending Date: January 6, 1990
___ OES ___ Others
Representatives

_X_ Claimant Appeal

____ Employer Appeal

FINDINGS OF FACT:

1. For purposes of this appeal claimant was last employed by Bishop Leonard Regional

School for approximately four months as a math and science teacher and her last day of work was on or about December 21, 1989.

2. Bishop Leonard Regional School is a Catholic school operated by the Diocese of Pittsburgh.

3. The School has a policy providing as follows:

   1.2 The Parish shall retain the prerogative to dismiss a teacher for serious public immorality, public scandal or public rejection of official teachings, doctrine, or laws of the Catholic Church. In the event that the Parish exercises such prerogative, the grievance procedure in this Handbook shall not be applicable. Such a termination would, however, be subject to review under the Code for the Assurance of Due Process of the Diocese of Pittsburgh.

4. Sometime prior to December 1989 the claimant, a member of the Catholic Church, entered a relationship with a non-Catholic which ultimately resulted in a decision by the couple to be married. An event which occurred on December 23, 1989.

5. Claimant's husband was previously married to a Catholic and the marriage was subsequently dissolved through divorce proceedings. The marriage, however, has never been annulled by the Catholic Church.

6. Sometime within the first two weeks of December 1989 the claimant advised her

school principal of her intention to be married, the circumstances of her husband's previous marriage and that the couple could not be married in the Catholic Church because of such circumstances.

7. After consultation with Diocese authorities the school principal advised the claimant that her employment would be terminated if she proceeded with her planned marriage because it would violate the policy prohibiting teachers from engaging in conduct amounts i to a "public rejection of official teachings, doctrine or laws of the Catholic Church."

8. Forced to chose between her plans to be married and her job the claimant opted to proceed with her marriage.

9. Claimant was dismissed by the employer under the above described policy.

REASONING: Section 402(e) of the Pennsylvania Unemployment Compensation Law states in relevant part as follows:

> An employee shall be ineligible to compensation for any week-
>
> . . .
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work...

A very similar factual situation was recently considered by Commonwealth Court of Pennsylvania in the case of Bishop Carroll High School v. U.C.B.R., ___ Pa. Com. Ct. ___, 557 A.2d 1141 (1989). In that case, a teacher in a Catholic School notified his

employer that he was cohabiting with a divorced woman to whom he was not married and whose previous marriage had not been annulled. He was dismissed under a policy similar to that being considered in the instant appeal even though he offered to be married in a civil ceremony. The court denied benefits to the claimant under Section 402(e) rejecting his argument that he had cause for his conduct, to wit, his constitutional right to privacy.

While the facts of the instant appeal was very similar to those involved in the Bishop Carroll HIgh School case, nevertheless, the Referee finds the two cases distinguishable. First, the claimant in the instant appeal was not cohabiting without the benefit of marriage. Second, the claimant's good cause argument in this case is based upon a different theory considered by the court in the Bishop Carroll Case.

The claimant's good cause argument here is that she was forced to make a choice between being married and maintaining her job. The Referee believes that forcing such a choice upon an employee is unreasonable on the part of the employer and further that the desire to be married constitutes good cause for the claimant's violation of the employer's policy. While the employer may be justified under its precepts in dismissing an employee who does not comply with the teachings of the church this does not in the present case amount to willful misconduct on the part of the claimant. Accordingly she will not be disqualified and her request for benefits is approved.

ORDER: The determination of the Office of Employment Security is reversed and claimant is allowed claim credit for waiting week ending January 6, 1990.

PAUL A. SNEED, REFEREE

(2)

No. 91-1365

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARIA WESLEY,

Petitioner,

v.

THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

and

BISHOP LEONARD REGIONAL CATHOLIC SCHOOL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION OF RESPONDENT BISHOP LEONARD REGIONAL CATHOLIC SCHOOL

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court lack jurisdiction to review the Free Exercise claim raised for the first time by petitioner in Question Number Two of the petition for certiorari?

2. Does permitting a pervasively religious employer to discharge an employee for violating a religious work rule, without charging that employer for unemployment benefits, violate the Establishment Clause of the First Amendment to the United States Constitution?

3. Would requiring the respondent Bishop Leonard Regional Catholic School to pay unemployment benefits when it discharges a teacher who was employed in one of its elementary schools, because she knowingly disobeyed its religiously based work rule, violate respondent's rights under the Free Exercise Clause?

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STATEMENT OF THE CASE

This case involves the denial of unemployment compensation benefits to a teacher who was discharged from a Roman Catholic elementary school for violating its religiously based work rule. That rule required teachers to refrain from publicly rejecting the teachings of the Roman Catholic Church.

Pennsylvania's unemployment compensation law disallows benefits where an employee has been discharged for willful misconduct. As construed by the Pennsylvania courts, the "violation of a known and reasonable [employer] rule establishes willful misconduct." Appendix to Petition for Certiorari ("App.") at A9. The burden is on the employer to "establish the existence of the rule or policy and that the employee was aware of it." *Id.* Although statutorily exempt from mandatory participation in the state unemployment compensation program, Respondent, Bishop Leonard Regional Catholic School ("Bishop Leonard"), participates therein voluntarily.

Bishop Leonard introduced evidence at the administrative hearing which established the existence of a written policy of the School which, as a condition of employment, prohibited its teachers from publicly rejecting the official teachings, doctrine, or laws of the Catholic Church. Father DiNardo (misidentified in the Record as "Donardo"), Chancellor of the Diocese of Pittsburgh, testified as a qualified expert on behalf of Bishop Leonard regarding the Church's official teachings on marriage as a sacrament and on canonical impediments to valid sacramental marriage within the Catholic Church. His unrebutted testimony was that Church teachings require that any prior marriage of a Catholic be canonically annulled before a canonically sanctioned marriage may be entered into by Catholics. Notes of Testimony from hearing, 2/21/90 ("N.T."), at 7.

Petitioner, Ms. Wesley, a teacher at Bishop Leonard who is a baptized Catholic, married a man who was

divorced from a Catholic woman and whose prior marriage had not been annulled by the Catholic Church. N.T at 7. Hence, her marriage was not recognized by the Church as canonically valid. Father DiNardo testified that by its very nature, marriage is a public act within the Church and Ms. Wesley's marriage was, therefore, a public rejection of the official teachings and laws of the Church. N.T. at 7; App. at A10-A11.

Bishop Leonard is a pervasively religious school which is owned and operated by the Roman Catholic Diocese of Pittsburgh. The teaching of Catholic faith and doctrine is integral to its very existence. N.T. at 10. Teachers are the principal instruments by which these tenets of faith are transmitted. Father DiNardo testified that students are expected to be taught the Catholic faith not only by word but also by example and that all teachers are expected to act as role models for their students both in and out of class regardless of the particular subject taught.[1] N.T. at 10; App. at A12-A13. Ms. Wesley admitted that she was aware of the school's policy and was aware that her conduct violated that policy. N.T. at 14.

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1. Contrary to Ms. Wesley's assertions, Bishop Leonard has never conceded that she "satisfied the demands of her [teaching] position" or that her "marriage would not negatively affect her competency as a teacher." Petition at pp. 5 and 8. Rather, Bishop Leonard specifically argued that:

> "Catholic teachings on the sanctity of sacramental marriage and its indissolubility cannot be taken seriously by students when their teachers fail to follow those teachings. Thus, the actions of teachers outside of the classroom which are in conflict with the teachings they are expected to convey have great potential for undermining their effectiveness in the classroom." Reply Brief of Bishop Leonard in the Commonwealth Court at 6-7.

And the Commonwealth Court stated: "We agree that claimant's conduct directly reflected on her ability to perform her assigned duties and adversely affected the interest of Bishop Leonard." App. at A13-A14.

It was and is the position of Bishop Leonard that because Ms. Wesley had knowingly violated its reasonable work rule, she was ineligible for unemployment compensation benefits under traditional willful misconduct analysis applied in consonance with authoritative Pennsylvania court decisions. Conversely, Ms. Wesley presented evidence that she did not engage in conduct which would disqualify her from benefits under Pennsylvania's prevailing standards for determining whether she had been guilty of work-related willful misconduct.

The Office of Employment Security denied benefits on willful misconduct grounds. The Referee reversed that decision and entered an order allowing benefits because he felt that Bishop Leonard's rule was unreasonable. The Unemployment Compensation Board of Review affirmed the Referee's determination, though on other statutory grounds. Bishop Leonard appealed that decision to the Commonwealth Court.

Applying traditional willful misconduct analysis to the above facts, the Commonwealth Court, by a vote of 4-3, rejected Ms. Wesley's statutory arguments. Instead, it held that "Bishop Leonard had established the existence of a reasonable policy, that Claimant was aware of the policy and that her violation of [the] policy constituted willful misconduct." App. at A18-A19. Accordingly, the court held that Ms. Wesley was not entitled to benefits under the Pennsylvania unemployment compensation law.[2]

After making this determination, the court turned its attention to Ms. Wesley's Establishment Clause argument.[3] The court noted that Ms. Wesley had argued that a denial of benefits based on the violation of a

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2. Of course, the correctness of the authoritative construction of the Pennsylvania unemployment compensation law by the Pennsylvania courts is not before this Court.

3. As set forth in greater detail below, Ms. Wesley did not argue that her free exercise rights were violated.

religiously based work rule constituted an unconstitutional establishment of religion because, in her view, it "serves to advance the Catholic religion." App. at A19. The court rejected that argument, holding that the state's failure to award unemployment benefits to Ms. Wesley constituted a permissible accommodation of the religious liberty interests of Bishop Leonard; not an impermissible establishment of religion. App. at A22-A23.

Having determined that Ms. Wesley was ineligible for unemployment benefits under the state statute and that application of traditional willful misconduct analysis under the statute did not violate the Establishment Clause, the court did not reach the Free Exercise issue raised by Bishop Leonard.

Judge Smith dissented, stating her view that the denial of benefits based on traditional willful misconduct analysis violated the Establishment Clause. Judge Byers also dissented, stating that he did not believe that the state could deny benefits for willful misconduct based upon violation of a religiously based work rule. Judge Kelley dissented without opinion.

The Pennsylvania Supreme Court denied review without opinion.

SUMMARY OF ARGUMENT

Two questions are presented for review by petitioner, Ms. Wesley: one under the Establishment Clause; the other under the Free Exercise Clause. The latter question was not raised by Ms. Wesley in the state courts and those courts did not rule upon that issue. Accordingly, that question is not properly before this Court.

Ms. Wesley, nevertheless, suggests that review by this Court is necessary because the lower court's ruling "badly misinterprets and misapplies several decisions" of this Court regarding the free exercise rights of individuals in the context of entitlement to unemployment

benefits. Petition at 17-18. Only one of the cases cited by Ms. Wesley as having been "misapplied" or "misinterpreted" by the court, *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), is even mentioned by the court below, and that case is not cited by the court for its Free Exercise Clause applications. Rather, it is cited by the court for its Establishment Clause principles. Thus, it can hardly be argued that review by this Court is warranted in order to rectify the lower court's decision on free exercise grounds—it made no such holding.

Ms. Wesley also contends that review by this Court is warranted because the lower court held that an award of unemployment benefits would impermissibly infringe upon the free exercise rights of Bishop Leonard. She asserts that such a holding "conflicts directly with the holding . . . of this Court in *U.S. v. Lee.*" Petition at 18. To the contrary, although Bishop Leonard had argued that an award of benefits would infringe upon its free exercise rights, the Commonwealth Court did not reach that issue. Instead, it held that benefits must be denied to Ms. Wesley due to the fact that she had engaged in willful misconduct under the statutory framework. The court's holding was based entirely on its construction of the Pennsylvania unemployment compensation law; not on any federally guaranteed free exercise right of Bishop Leonard. Thus, the lower court's holding in no way conflicts with this Court's decision in *Lee.*

Finally, as to Ms. Wesley's Establishment Clause claim, the lower court's decision is consistent with the prior decisions of this Court. Thus, none of the considerations governing review on writs of certiorari which are set forth in Rule 10 of this Court's rules are present in this case. Accordingly, the petition should be denied.

REASONS FOR DENYING REVIEW

I. PETITIONER DID NOT RAISE AND PRESERVE HER FREE EXERCISE CLAIM IN THE STATE COURTS, AND THAT QUESTION IS NOT PROPERLY BEFORE THIS COURT.

Ms. Wesley has presented two questions for review by this Court.[4] Question Number Two of the Petition for Certiorari requests that the Court decide whether a denial of unemployment benefits to Ms. Wesley impermissibly burdens her free exercise rights under the First Amendment to the United States Constitution. Ms. Wesley did not raise this issue before the state court and that court did not address the issue. Therefore, that question is not properly before this Court.

This Court has often stated that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also, Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-181 and n.3 (1983); *Rotary International v. Rotary Club*, 481 U.S. 537, 549-550 and n.9 (1987).

In *Cardinale*, after granting certiorari, it became apparent that the question before the Court "had never been raised, preserved, or passed upon in the state courts below," and the Court, accordingly, dismissed the writ for lack of jurisdiction. 394 U.S. at 438-39. In so doing, the Court stated:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not

4. Question Number One involves the Establishment Clause and Bishop Leonard acknowledges that that issue was raised in and decided by the court below. It is addressed in Part II of this brief.

> compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Id.[5]

Not only does this Court lack jurisdiction over Ms. Wesley's free exercise claim, the facts of this case make it particularly inappropriate for review. First, as set forth in Part B of this Section, the record is devoid of evidence which would support the claim. Second, because of Ms. Wesley's failure to raise the issue below, the Pennsylvania courts have been deprived of an opportunity to rule upon it. Review by this Court under these circumstances would violate important principles of federalism.[6]

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5. The Court appears to have a somewhat more flexible approach where it is asked to review issues which were not presented to or decided by lower federal courts. *See e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from the *federal courts* that questions not pressed or passed upon below are reviewed.") (emphasis added); *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Capitol Cities Cable Inc. v. Crisp*, 467 U.S. 691, 697-698 (1984). However, even in these cases, this Court only grants review where the record contains sufficient facts to enable the Court to resolve the issue and the question for the Court is purely legal.

6. It is clear that where a Free Exercise claim is raised, the Pennsylvania Commonwealth Court is more than willing to assure that the issue is properly addressed. In *Monroe v. UCBR*, 112 Pa. Commonwealth Ct. 488, 535 A.2d 1222 (1988), a claimant alleged that she had quit her job because she felt that her duties were in conflict with her religion and that a denial of unemployment benefits violated the First Amendment's Free Exercise Clause. The Commonwealth Court remanded the matter to the Board for further factual findings stating:

> Due to our inability to make factual findings and due to the Board's failure to make necessary findings on relevant issues, we are unable to determine, as a matter of law, whether or not

A. This Court Lacks Jurisdiction Over Ms. Wesley's Free Exercise Claim Because She Did Not Properly Raise That Issue in the State Courts.

In *Rotary International, ante,* this Court stated:

> It is well-settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'

481 U.S. at 550 *quoting, Webb v. Webb,* 451 U.S. 493, 496-497 (1981). In keeping with this requirement, Rule 14(h) of this Court's rules states that a party seeking review of a state court judgment must specify in the statement of the case, the stage in the proceedings, at each stage of review, where the federal questions sought to be reviewed were raised, the manner in which they were raised, and the way in which they were passed upon by the state courts. Rule 14(h) also requires that pertinent portions of the record where the federal question is addressed be specified.

Petitioner has failed utterly to comply with this requirement. She states that she "argued that her right to free exercise of her religious choices . . . would be

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NOTES *(Continued)*

> the claimant's actions were motivated by 'religious' reasons and thus within the ambit of First Amendment protection. We must, therefore, remand this matter to the Board for an evidentiary hearing and findings.
>
> On remand, the Board must first determine the beliefs that the claimant actually held and whether or not those beliefs were sincere, as well as religious (as opposed to secular) in nature. Findings are then necessary on the job requirements which the claimant believed to be in conflict with her religious beliefs. If the Board should determine that her beliefs were sincerely held and religious in nature, it must then determine whether or not there was an actual conflict between those *beliefs* and the employer's job requirements.

112 Pa. Commonwealth Ct. at 496-97, 1225 (emphasis in original).

penalized" by a denial of benefits. Petition at 11. However, she does not cite any portion of the record to support this claim. This is not surprising since it is impossible for her to do so.

One may search the record in vain to find any reference in the Commonwealth Court, expressly or by implication, to demonstrate that a federal free exercise claim was presented for review. Ms. Wesley presented three questions for review at the Commonwealth Court. Two dealt with the proper construction of the willful misconduct provision of the Pennsylvania statute. The third asked whether a denial of benefits would impermissibly constitute an "establishment of religion." Brief of Intervenor in Commonwealth Court at 1. At no point in the brief did Ms. Wesley cite to any federal case, let alone one of this Court's decisions in the area of Free Exercise.[7] Thus, it is plain why the Commonwealth Court "did not address Ms. Wesley's free exercise claims." Petition at 12. Petitioner never gave that court any indication that she wished to raise such a claim.

Ms. Wesley, in her subsequent petition for review by the Pennsylvania Supreme Court, did ask in one question whether the denial of benefits "unconstitutionally interferes with the petitioner's right to religious freedom." Petition for Allowance of Appeal to the Pennsylvania Supreme Court at 1. It should be noted that no specific reference to the United States Constitution was made in that question and that Ms. Wesley's arguments

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7. In *Rotary International*, this Court held that issues of vagueness and overbreadth were not adequately raised below even though the appellants had cited to a Supreme Court decision and quoted from it regarding the fact that vague and overbroad statutes tend to allow selective enforcement against unpopular causes. 481 U.S. 550, n.9. In so holding, the Court stated that a casual reference to a federal case "is insufficient to inform a state court that it has been presented with a [federal question]." *Id.* Here, Ms. Wesley did not even mention a federal case on point.

in her brief relied on the Pennsylvania Constitution.[8] Petition for Allowance of Appeal at 10-11.

The Pennsylvania Supreme Court denied review without opinion. App. at A1. This Court has often stated:

> [W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'

Rotary International, 481 U.S. at 550, *quoting, Exxon Corp. v. Eagerton,* 462 U.S. at 181 n.3. Accordingly, it must be assumed that the Pennsylvania Supreme Court's failure to grant review and rule upon a free exercise claim was due to Ms. Wesley's failure to properly raise that issue in the Commonwealth Court and her failure to present it for review in its own court in any recognizable form.[9]

B. There Are No Facts in the Record Which Would Support a Free Exercise Claim by Petitioner.

Even if this Court had jurisdiction to decide Ms. Wesley's free exercise claim, it should decline to do so because there are no facts in the record upon which the question could be decided. Ms. Wesley appears to argue

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8. Ms. Wesley's sole reference to the Free Exercise Clause in her brief is contained in one sentence which simply states that the First Amendment "provides that 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.' " Petition for Allowance of Appeal at 10.

9. Rule 302(a) of the Pennsylvania Rules of Appellate Procedure states: "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Moreover, Rule 1115 requires that a party petitioning for review "append to the petition the verbatim texts of the pertinent provisions of constitutional provisions . . . which the case involves." Although Ms. Wesley's petition contained the necessary appendix, it did not set forth the First Amendment to the U. S. Constitution as a pertinent provision which the case involved. See Appendix "C" to Petition for Allowance of Appeal.

that this Court's decisions in *Sherbert v. Verner,* 374 U.S. 398 (1963), *Thomas v. Review Board,* 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) and *Frazee v. Employment Security Dept.*, 489 U.S. 829 (1989) are dispositive of her claim. Petition at 33-35.

However, this Court has repeatedly stated that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." *Thomas,* 450 U.S. at 713; *Frazee,* 489 U.S. at 833. The Court has also stated that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task." *Thomas,* 450 U.S. at 714. And the Court has readily acknowledged the "difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held." *Frazee,* 489 U.S. at 833. Accordingly, "[s]tates are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." *Id.*

Thus, this Court's decisions make it clear that it is necessary to make factual findings before a decision on free exercise grounds can be rendered. In each of this Court's unemployment compensation cases where it was held that a denial of benefits violated the free exercise rights of claimants, this Court was careful to note that specific factual findings had been made below regarding the particular religious belief held by the claimant, the sincerity of the claimant's beliefs and the existence of a conflict between that belief and her job requirements. Or, at least, the Court noted that the sincerity of the religious belief was not challenged.[10]

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10. *Sherbert v. Verner*, 374 U.S. at 399 and n. 1 ("No question has been raised concerning the sincerity of Appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible."); *Thomas v. Review Board*, 450 U.S. at 710-12 and accompanying notes ("The hearing referee found that Thomas' religious beliefs specifically

The record in this case is completely devoid of any evidence which would support a finding that Ms. Wesley's violation of her employer's work rule was due to sincerely held religious beliefs, rather than purely secular personal preferences. In her pleadings and papers filed at the administrative level and her testimony at the hearing, Ms. Wesley argued only that her conduct did not constitute "willful misconduct" within the meaning of the unemployment law and that she was, therefore, entitled to benefits. She did not argue that a denial of benefits would violate her religious beliefs, and there is no evidence whatsoever in the record regarding the actual beliefs allegedly held by Ms. Wesley, the sincerity of those beliefs, or the existence of a conflict between those beliefs and her job requirements.

Neither the hearing Referee nor the Board of Review made any finding with respect to these points. The findings made by each entity related only to issues relevant to traditional willful misconduct analysis—*i.e.*, the existence of an employer work rule or policy and whether that rule or policy was violated. Indeed, the only facts relevant to religious beliefs that appear in the record are: 1) that Ms. Wesley "considered herself [to be] a Catholic," N.T. at p. 13; and 2) that the teachings

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NOTES *(Continued)*

precluded him from producing or directly aiding in the manufacture of items used in warfare." The Board also found that "[t]he evidence of record indicates that claimant . . . left his employment voluntarily because his religious beliefs . . . would not allow him to continue to work producing arms . . ." and "the finding is not challenged in this Court."); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. at 138 and n.2 (Hobbie informed her employer that she "was to be baptized into the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work on her Sabbath." "It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held."); *Frazee v. Employment Security Dept.*, 489 U.S. at 833 ("[T]he Board of Review characterized Frazee's [refusal to work Sundays as based on his] 'religious convictions.' " "The courts below did not question his sincerity, and the State concedes it.")

of the Catholic Church specifically prohibit the conduct in which she engaged. N.T. at pp. 7-9.

The record demonstrates only that Ms. Wesley "just wanted to be married," N.T. at 13; not that any religious belief compelled her to marry without the benefit of an annulment. Apparently, she desired to go through with her marriage immediately, without waiting to determine whether an annulment[11] could be obtained or whether she could ultimately conform her conduct to Bishop Leonard's requirements. Her reasons for refusing to delay may have been due to the fact that she had sent out invitations and did not want to inconvenience her guests, or may have been due to any number of other possibilities which have not been explored. There is simply no way of telling, from the record in this case, what her reasons were and they cannot be presumed.

This Court has stated that membership in an organized religious denomination that has specific tenets forbidding conduct that is required by one's work, is not required to be shown in order to establish that one's religious beliefs are in conflict with job requirements. *Frazee*, 489 U.S. at 834. The Court, however, has noted

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11. It is not clear that formal annulment proceedings were ever initiated. Bishop Leonard was unaware of such filings and refused to stipulate to this. N.T. at 6. The sole evidence of record on this point consists of oral statements by Ms. Wesley and Fr. DiNardo. There are no documents which would demonstrate whether a proceeding was initiated or that a resolution had been reached. Ms. Wesley's sole testimony on this point was that Mr. Wesley's previous wife had "contacted him about the proceeding in an attempt to go through with the annulment" and that to her knowledge it had not been successful. N.T. at 11-12. On cross-examination, Ms. Wesley stated that she was not aware that her husband had ever received a written notice that any annulment which was purportedly pursued was denied. *Id.* Father DiNardo testified that if an annulment proceeding were initiated, both parties would receive written notice of the proceedings by the ecclesiastical tribunal and would also receive written notice upon the grant or denial of an annulment. *Id.* at 14. If the annulment petition were denied, the notice would also inform the parties of their right to appeal. *Id.* at 14-15.

that such membership "would simplify the problem of identifying sincerely held religious beliefs." *Id.* Quite the opposite is true here. Ms. Wesley claims to belong to the Catholic Church—a hierarchical religious denomination that has a specific tenet *forbidding* the conduct in which she engaged. Thus, any claim which she might make regarding her beliefs would be at odds with the teachings of her own church.

Where a member of an organized Church takes a position which is in conflict with that Church's doctrines, or disputes the authenticity of interpretations of those teachings by Church officials, this Court has consistently recognized, as binding, the official interpretation by the Church hierarchy. This Court's holding in *Thomas* is not to the contrary. There, the employee, a Jehovah's Witness, claimed to have a religious belief which was *consistent* with the teachings of his church, though some other members of that church felt that the work involved was not necessarily forbidden by the church's teachings.

The law is clear that religious bodies have the right to self-governance and that the civil authority may not intrude upon that right. More than a century ago, in language which it has often repeated, the Supreme Court said:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions,* and of their right to establish tribunals for the decisions of

> questions arising among themselves that those decisions should be binding in all cases of ecclesiastical cognizance, *subject only to such appeals as the organism itself provides for.*

Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-729 (1872). (Emphasis added.) It is a matter of common observation that, in all religious associations, conflicts and tensions arise and claims are made that those in recognized authority have acted unfairly. However, it is equally true that:

> . . . it is of the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-715 (1976). And *see, Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952).

While, in *Serbian* (and other cases) the Court has held the self-governance of religious associations to be protected by the Religion Clauses of the First Amendment, the view of even the dissenting justices in *Serbian* would likewise sustain the self-governance principle on the basis of contract. Justices Rehnquist and Stevens, in *Serbian*, quoted from *Gonzales v. Archbishop,* 280 U.S. 1, 16-17 (1929) as follows:

> 'In the absence of fraud, collusion, or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise.*'

Serbian, 426 U.S. at 729-730. (Emphasis in the original).

As noted by the Commonwealth Court, Ms. Wesley was employed by the Church on the condition that she refrain from publicly rejecting the Church's teachings. App. at A10-A12. Thus, even if Ms. Wesley had claimed to hold a differing view regarding the meaning of the Catholic Church's official teachings (which she did not seriously dispute), the civil authorities would have been bound by the Church's own interpretations.

II. THE COMMONWEALTH COURT'S DENIAL OF BENEFITS ON THE BASIS OF TRADITIONAL WILLFUL MISCONDUCT ANALYSIS IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Ms. Wesley argues that by denying her unemployment benefits under the Pennsylvania statute, the State has violated the Establishment Clause. Her argument proceeds as follows. Traditional willful misconduct analysis requires an inquiry into whether an employer's work rule is reasonable and whether that rule has been actually violated. Whenever the rule in question is religiously based, the Courts and state agencies would be forced to examine religious doctrines and tenets to determine whether the employee violated a religious rule and whether the rule itself is reasonable. In Ms. Wesley's view, this determination necessarily results in the government favoring or endorsing one religion over another and also necessarily entangles the government excessively in religious questions.

Accordingly, Ms. Wesley argues that it is unconstitutional to apply traditional willful misconduct analysis to religious employers when an employee is discharged for violating a religiously based work rule. Instead, she argues that the state must ignore the religious character of the employer and treat that employer as it would any non-religious employer. Petition at 27.

Of course, since non-religious employers are prohibited by law from discriminating on the basis of religion, it would be *per se* unreasonable for a non-religious employer to attempt to impose a religiously based rule upon its employees. Under Ms. Wesley's suggested approach, then, the state would be required to treat religious employers as though they were completely non-religious and award benefits whenever an employee is discharged for violating a Church's religiously based work rule. Thus, every religiously based work rule lawfully imposed by a Church would be treated as *per se* unreasonable. A religious school would have to pay unemployment benefits even if it discharged a teacher for actively teaching heresy to its students.

The Commonwealth Court rejected Ms. Wesley's approach. The court, instead, applied traditional willful misconduct analysis and recognized, as binding, the interpretations of religious doctrine by the Church. The failure of the state to charge Bishop Leonard's accounts as a result of its exercise of Church discipline does not serve to advance a particular religion in violation of the Establishment Clause. Nor does the manner in which the court applied willful misconduct analysis excessively entangle the government in religion.

A. The Commonwealth Court's Decision Does Not Have the Primary Effect of Advancing a Particular Religion in Violation of the Establishment Clause.

Ms. Wesley claims that the denial of unemployment benefits violates the Establishment Clause because it serves to advance the Catholic religion by allowing the Catholic Church to impose its beliefs on its employees. To the contrary, no particular religious employer is being singled out for favorable treatment as a result of the lower court's recognition of the general right of hierarchical churches to interpret their own rules and discharge employees when they violate those rules. Under the lower court's decision, any religious employer, no

matter what sect or denomination, that imposes religious requirements based on its own doctrines on its employees would be exempt from paying unemployment benefits to an employee who knowingly violated those requirements. For example, a teacher in a Jewish school that required its teachers to abide by its religious teachings regarding consumption of pork or participation in religious ceremonies, would engage in disqualifying willful misconduct if he knowingly violated those rules. Likewise, a Mormon employer that required its teachers to observe that Church's standards in such matters as regular church attendance, tithing and abstinence from coffee, tea, alcohol and tobacco would not be required to pay unemployment benefits to an employee who knowingly violated those rules.

By accommodating the Free Exercise rights of such religious employers, the state does not, thereby, violate the Establishment Clause. In *Hobbie*, and in *Sherbert*, it had been argued that awarding benefits to an employee who was discharged because she refused to work on the Adventist Sabbath would violate the Establishment Clause because it would advance the Seventh-day Adventist religion. This Court rejected the Establishment Clause argument in each case. *Sherbert*, 374 U.S. at 409; *Hobbie*, 480 U.S. at 144-145. In *Hobbie,* the Court stated:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

Id. at 145.

Just as the state does not violate the Establishment Clause by accommodating the religious beliefs of employees under its unemployment compensation program, it does not violate that clause by accommodating the religious beliefs of an employer. As this Court stated in *Corporation of Presiding Bishop v. Amos*:

> Undoubtedly, religious organizations are better able to advance their purposes [under the law]. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster . . . A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that *government itself* has advanced religion through its own activities and influence.

483 U.S. 327, 336-37 (1987).

The failure of the state to tax Bishop Leonard's account because it has exercised its religious liberty constitutes a permissible accommodation of that entity's religious freedom (as the Commonwealth Court held), not an establishment of religion. Ms. Wesley apparently overlooks the fact that the benefits which would be paid to her would not ultimately be paid from state funds. Rather, Bishop Leonard's account would be charged on a dollar-for-dollar basis. Unlike for-profit employers, Bishop Leonard is not mandatorily required to contribute to the unemployment compensation fund as an insurance fund. Instead, Bishop Leonard participates on a reimbursement basis whereby it is billed by the Commonwealth only when benefits are legitimately paid out to qualified claimants.

B. Application of Traditional Willful Misconduct Analysis, With Proper Deference To Religious Freedom, Does Not Excessively Entangle the State in Religion in Violation of the Establishment Clause.

Under Pennsylvania law, the reasonableness of an employer's work rule cannot be "considered in a vacuum. It must be considered in relation to the *particular employees* and to the reasonable standards expected by a *particular employer*." *Woodson v. Unemployment Comp. Bd. of Review*, 461 Pa. 439, 443, 336 A.2d 867, 868

(1975) (emphasis added). In determining that Bishop Leonard's rule requiring that its teachers refrain from publicly rejecting the Catholic Church's teachings was reasonable, the Commonwealth Court took into consideration the religious nature of the employing school and the particular role of the teacher employed within that school.

Ms. Wesley argues, however, that to apply the statute in this manner impermissibly entangles the government in religion. She insists that in order to avoid such entanglement, the state must ignore the religious nature of Bishop Leonard and treat it as though it were a secular employer. Thus, because a secular employer could not lawfully require her to abide by the teachings of the Catholic Church, neither could Bishop Leonard.

Ms. Wesley claims that this approach will place the state in a position of neutrality toward religion. However, in actuality, her approach requires the state to treat religious employers less favorably than all non-religious employers. For example, in *Giglio v. UCBR*, the court held that an employee had engaged in willful misconduct when he knowingly violated a rule of the Pennsylvania Supreme Court which prohibited court appointed employees from engaging in political activities. 126 Pa. Commonwealth Ct. 471, 560 A.2d 271 (1989). The employee sought unemployment benefits upon his discharge arguing that his refusal to obey the rule was reasonable because the rule forced him to choose between resigning from his employment and exercising his right to engage in political activity. The Commonwealth Court refused to hold that he was entitled to unemployment benefits, noting that the Court could constitutionally require him to refrain from political activity. Although it may have been unreasonable for another employer to impose such a restriction on its employees, the rule was reasonable because of the particular nature of the judiciary and its need to maintain its impartiality and avoid the appearance of impropriety. As *Giglio* demonstrates, purely secular employers

such as the judiciary have the benefit of having their particular needs taken into consideration while religious employers, according to petitioner, cannot be accorded similar treatment.

This Court's decisions do not support Ms. Wesley's approach. In resolving intrachurch disputes, this Court has stated that "the First Amendment severely circumscribes the role that civil courts may play." *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 449 (1969). "[T]he Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones v. Wolf*, 443 U.S. 595, 602 (1979), citing *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-725 (1976); *Watson v. Jones*, 80 U.S. (13 Wall. 679, 733-734 (1872).

Ms. Wesley claims that by deferring to the Catholic Church's interpretations of what constitutes a public rejection of its doctrines and laws, the state would impermissibly establish religion. Petition at 21-24. The above cases indicate otherwise. Deference to the Church's interpretations of its own laws does not violate the Establishment Clause. Rather, it is constitutionally required precisely in order to avoid excessive entanglement of government in religious affairs.[12]

The Commonwealth Court rendered its decision in conformity with these principles. It applied generally prevailing principles of law regarding willful misconduct

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12. In making her arguments, Ms. Wesley relies heavily on the fact that Bishop Leonard voluntarily participates in the state unemployment compensation program. She even suggests that this fact makes any infringement on its religious liberties that would be caused by an award of benefits permissible. Petition at 27-29. It is thoroughly unreasonable to presume that Bishop Leonard would voluntarily participate in an unemployment compensation program in which its liberty to protect the integrity of its religious mission is denied by the lack of a meaningful "willful misconduct" disqualification precisely where it is needed most: to avoid financial penalties where Bishop Leonard seeks to enforce those work rules which lie at the heart of the enterprise.

determinations and it accepted the Church's determinations regarding the violation of its work rule insofar as such determinations involved Church doctrine, discipline and policy. Accordingly, the Commonwealth Court's decision does not conflict with the decisions of this Court.

CONCLUSION

For the foregoing reasons, respondent Bishop Leonard requests, that the Petition for Certiorari be denied.

Dated: March 20, 1992

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